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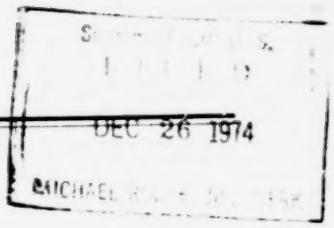

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1974

No. [illegible]

McKENNIE HOUSTON,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

JAMES J. DOHERTY,
Public Defender of Cook County,
407 Chicago Civic Center,
Chicago, Illinois 60602,
(312) 443-6350,
Counsel for Petitioner.

RONALD P. ALWIN,
Assistant Public Defender,

ROBERT B. THOMPSON,
Law Student, IIT - Chicago-Kent College of Law,
Of Counsel.

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner McKennie Houston respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, affirming the judgment of the Circuit Court of Cook County. The judgment of the Circuit Court of Cook County is not reported. The opinion of the Appellate Court is reported at 21 Ill. App. 3d 209, 315 N.E. 2d 192 (1974). The opinion of the Appel-

late Court is included as Appendix "A" to this petitioa. The order of the Supreme Court of Illinois denying the petition for leave to appeal without opinion is not officially reported. The letter from the Supreme Court of Illinois denying Leave to Appeal is included as Appendix "B" to this petition.

JURISDICTION

The judgment of the Appellate Court of Illinois was entered on June 25, 1974. A Petition for Leave to Appeal to the Supreme Court of Illinois was timely filed and denied on September 27, 1974. The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner was deprived of a fair trial when the State was allowed to show that he had been arrested for an unrelated offense where there was no issue of identity, motive or intent as to petitioner.

2. Whether petitioner was deprived of due process and equal protection when the appellate court ignored the above contention on appeal and decided the case on grounds applicable only to petitioner's co-defendant.

3. Whether the indictable misdemeanor statute pursuant to which petitioner was convicted improperly vests with the prosecutor the discretion to decide whether conduct engaged in shall be prosecuted as a felony or a misdemeanor and therefore violates due process and equal protection of the laws.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment to the Constitution of the United States:

> ". . . Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws."

STATUTE INVOLVED.

Ill. Rev. Stat., 1971, Ch. 38, par. 12-6(b):

> "A person convicted of intimidation shall be fined not to exceed $5,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to five years, or both fined and imprisoned."

STATEMENT OF THE CASE

Petitioner and a co-defendant Leroy Davenport were charged by indictment with the indictable misdemeanor offense of intimidation in that they allegedly threatened to inflict physical harm on Lilly Mitchell or her children for the purpose of preventing her son, Arzell Mitchell, from testifying in court against a friend of Davenport and petitioner. Prior to trial petitioner filed a motion to dismiss the indictment on the grounds that the "indictable misdemeanor" statute pursuant to which he was charged violated Equal Protection of the laws by giving the prosecutor discretion to determine the applicable punishment by deciding whether to prosecute the offense as a misdemeanor or a felony. (A. 2) The motion was denied. (A. 3)

Both defendants were then tried to a jury. Both were represented by an Assistant Public Defender. At trial, eighteen-year old Arzell Mitchell (a/k/a Isiah) testified that, on August 18, 1971 at about 4:00 p.m., he was robbed of $150 and shot once in the back. While in the hospital, he identified two persons as the offenders. One was an individual named Arthur Lee Dozer. (A. 7)

Lilly Mitchell, Arzell's mother testified that on August 20, 1971 she was in her sister's seven-room apartment at 4525 South Federal Street in Chicago, when two male individuals came to the door. When Lilly Mitchell answered the door, one of the individuals asked whether she was the mother of the boy who got shot. She replied that she was, whereupon they threatened her life and the lives of Isiah and her other children if Isiah should testify against Dozer.

She testified that the two individuals then became verbally abusive. She then slammed the door and called detectives. The two individuals were identified by Lilly Mitchell at the trial as Leroy Davenport and petitioner. (A. 8-9)

On cross-examination, defense counsel attempted to impeach Mrs. Mitchell by confronting her with prior allegedly inconsistent statements made by her before the grand jury, at the preliminary hearing, and in the complaints charging petitioner and his co-defendant. (A. 9-17)

The final witness to testify was the investigating police officer, Officer Richard Crowley of the Chicago Police Department. He testified to having had a conversation with Arzell Mitchell relative to the latter's having been robbed and shot, after which the witness had occasion to arrest Arthur Lee Dozer and Ronald Caldwell. He also testified to having had a conversation with Mrs. Mitchell relative to two youths having approached and threatened her. An objection by defense to the testimony concerning the conversation with Mrs. Mitchell on hearsay grounds was overruled. Defense counsel also objected to the words "threatening her", which the trial judge then rephrased to "talking to her". Based on the facts given to him by Lilly, the officer stated that he then arrested Leroy Davenport and petitioner McKennie Houston. (A. 20-21)

During cross-examination of Officer Crowley, defense counsel referred to a police report in which co-defendant Leroy Davenport was referred to as Leroy Carpenter. On redirect examination, the prosecutor asked:

> Mr. Buffardi: [Prosecutor] Q. The Leroy Carpenter referred to in the police report, that is Leroy Carpenter also known as Leroy Davenport, is it, Officer?

Mr. Osheff: [Defense Counsel] Object. He said he didn't know.

The Court: Overruled. He may answer.

Mr. Buffardi: Q. Is that correct?

The Witness: Yes, it is.

Q. That is the person who Mrs. Mitchell identified as being one of the people who threatened her on August 20th, 1971, is that correct?

A. Yes, sir, it is.

Q. That is the same Leroy Davenport who is sitting in this court room, is that right, Officer?

A. Yes, sir, it is.

Q. And, Officer, does it state on your police report what, if anything, the defendants were charged with?

Mr. Osheff: Objection, your honor.

The Court: Overruled.

Mr. Osheff: Judge, objection.

The Court: You objected and I overruled it. I would like to hear the answer.

Mr. Osheff: I think it is immaterial.

Mr. Buffardi: Q. Officer?

A. Yes, sir, it does.

The Court: It may be in your opinion, and you have indicated so on the record. Proceed.

Mr. Buffardi: Q. Officer?

A. Yes, sir, it does.

Q. And what does it state that Leroy Davenport, also known as Leroy Carpenter, was charged with?

A. Armed robbery and aggravated battery.

Q. And what was McKennie Houston charged with?

Mr. Osheff: Objection again, your honor.

The Court: The same ruling. Overruled. He may answer.

Mr. Buffardi: Q. And what was McKennie Houston charged with Officer?

A. Armed robbery and intimidation.

Q. The case was brought before the grand jury of Cook County, Illinois, is that correct?

A. Yes, sir, it was.

Mr. Csheff: Objection, your honor.

A motion for a mistrial was made and denied. (A. 22-23)

Neither petitioner nor his co-defendant testified at the trial.

Petitioner and his co-defendant were found guilty by the jury and sentenced to two-and one half to five years in the Illinois State Penitentiary.

Petitioner and his co-defendant appealed to the Appellate Court of Illinois where they argued that the intimidation statute was unconstitutional and that they had each been denied a fair trial by the testimony elicited over objection as to the unrelated arrests for armed robbery. The judgments of conviction of both petitioner and his co-defendant were affirmed. *People* v. *Houston* 21 Ill.App.3d 209, 315 N.E.2d 192.

Petitioner then filed a petition for leave to appeal to the Illinois Supreme Court in which both arguments were again made. The petition for leave to appeal was denied on September 27, 1974.

REASONS FOR GRANTING THE WRIT

1.

PETITIONER WAS DEPRIVED OF A FAIR TRIAL WHEN THE STATE WAS ALLOWED TO SHOW THAT HE HAD BEEN ARRESTED FOR AN UNRELATED OFFENSE WHERE THERE WAS NO ISSUE OF IDENTITY, MOTIVE OR INTENT AS TO PETITIONER.

Although the State may have been justified in meeting the issue as to the identity of Leroy Davenport by showing his prior arrest for the unrelated offenses of armed robbery and battery, this provided no justification for the systematic and calculated reference to the prior armed robbery and battery arrests of this petitioner, who was thereby deprived of a fair trial and due process of law under the Fourteenth Amendment.

The proposition that the State is prohibited from showing a prior arrest, conviction or criminal activity as part of its case-in-chief is so fundamental that this Court has not often been called upon to rule on cases presenting this issue. This Court has held, however, that a defendant was denied a fair trial where the prosecution in a murder case introduced evidence that a month prior to the murder defendant had committed robberies upon three other persons. In holding that this collateral issue deprived defendants of a fair trial, this Court said:

> Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to

> produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged. *Boyd* v. *United States*, 142 U.S. 450, 458 (1891).

The same rule applies to arrests and evidence of charges upon which defendant has not been found guilty. (*United States* v. *Yarbrough*, 352 F.2d 491, 493 (6th Cir. 1965)).

There are of course exceptions to this rule. Where the prior criminal conduct is probative of identity, purpose, intent or modus operandi the prior criminal conduct is admissible.

The lower court attempted to justify admission of the prior arrest under the "identity" exception but this justification must fail because there was no issue of identity as to *petitioner*. Although defense counsel may have created an identity issue as to co-defendant Davenport, there was clearly no identity issue as to petitioner.

If, as the lower court concluded, "it was incumbent" upon the State to introduce evidence of Leroy Davenport's prior arrest to meet the issue of his identity, why was it necessary to place before the jury the prior armed robbery arrest of petitioner McKennie Houston? Unfortunately, neither the State nor the lower court offer any justification for this error. The opinion of the lower court therefore

stands as an example not only of misapplication of law but of poor judicial craftsmanship which provides no guidelines for future trials except as apparent authority for the proposition that the State's Attorney may ignore the State and Federal guarantee of due process of law.

The so-called issue as to the identity of co-defendant Davenport was, as the lower court observed, created when defense counsel "elicited the fact that [the police officer's] police report charged a Leroy Carpenter and not Leroy Davenport with the commission of certain crimes" (Appendix, p. 2a) and thereby "created an issue as to the identity of one of the defendants" (Appendix, p. 5a). The issue was created as to co-defendant Davenport—*not as to this petitioner*. There never was an issue as to the identity of petitioner.

Moreover, the lower court however, totally ignored the fact that the identity issue was resolved by the prosecutor on redirect examination before he entered the area of other crimes. The prosecutor asked:

> Mr. Buffardi: Q. The Leroy Carpenter referred to in the police report, that is Leroy Carpenter also known as Leroy Davenport, is it, Officer?
>
> Mr. Osheff: Object. He said he didn't know.
>
> The Court: Overruled. He may answer.
>
> Mr. Buffardi: Q. Is that correct?
>
> The Witness: Yes, it is.
>
> Q. That is the person who Mrs. Mitchell identified as being one of the people who threatened her on August 20th, 1971, is that correct?
>
> A. Yes, sir, it is.
>
> Q. That is the same Leroy Davenport who is sitting in this court room, is that right, Officer?
>
> A. Yes, sir, it is. (A. 22)

At this point the "issue" of identity had been completely resolved. The witness had testified three times that the defendant Leroy Davenport was the same person as Leroy Carpenter. It was totally unnecessary to go any further.

To the prejudice of both petitioner and his co-defendant however, the prosecutor continued and elicited that co-defendant Leroy Davenport was also the same Leroy Carpenter who had been charged with two separate and unrelated offenses. Over objection, he was allowed to ask a question designed to elicit the prejudicial testimony:

> Q. And what does it state that Leroy Davenport, also known as Leroy Carpenter, was charged with?
>
> A. Armed robbery and aggravated battery. (A. 23)

Not being satisfied with prejudicing the case of Leroy Davenport, the prosecutor then proceeded to elicit the same prejudicial material as to petitioner (Houston)—about whom there was no issue of identity:

> Q. And what was McKennie Houston charged with?
>
> Mr. Osheff: Objection again, your honor.
>
> The Court: The same ruling. Overruled. He may answer.
>
> Mr. Buffardi: Q. And what was McKennie Houston charged with, Officer?
>
> A. Armed robbery and intimidation. (A. 23)

There was absolutely no reason for the State's Attorney to go into the prior armed robbery and battery arrests of petitioner. This purposeful and obviously prejudicial conduct of the prosecutor deprived this petitioner of a fair trial.

It is no answer here to argue that the evidence was overwhelming and that the case is governed by the harmless-constitutional-error rule. Although the lower court ob-

served that there was "sufficient evidence", apart from any prejudice created by the testimony, to convict both defendants (App. p. 5a) the mere fact that the evidence may have been "sufficient" is not controlling. There was no claim by the Court that the evidence was overwhelming or that the error was harmless beyond a reasonable doubt. Accordingly, petitioner was clearly deprived of a fair trial and due process of law.

2.

PETITIONER WAS DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION WHEN THE APPELLATE COURT IGNORED THE ABOVE CONTENTION ON APPEAL AND DECIDED THE CASE ON GROUNDS APPLICABLE ONLY TO PETITIONER'S CO-DEFENDANT.

Petitioner assigns this separate and rather unusual reason for granting the writ because the opinion of the lower court totally ignored the fact that there was no identity issue as to petitioner and decided the case on the totally inapplicable grounds that there was an identity issue as to petitioner's co-defendant. Petitioner respectfully suggests that under the circumstances it would be entirely appropriate for this Court to vacate and remand the judgment of the lower court for further proceedings in view of *Boyd*.

There are certainly Illinois cases which stand for the time-honored proposition that a prior criminal activity cannot be used against defendant. *People* v. *Ulrich*, 30 Ill.2d 94 (1963); *People* v. *Gregory*, 22 Ill.2d 601 (1961); *People* v. *Hayes*, 231 N.E. 2d 650 (Ill. App. 1967). These cases and others were cited to and ignored by the lower court in its apparent desire to affirm the conviction of both defendants.

Although the lower court's decision to affirm the conviction of co-defendant Davenport finds some support in the

record, its decision likewise to affirm the conviction as to petitioner is totally without support. The lower court ignored the principle that *each* defendant in a joint trial is entitled to a fair trial. In joint or consolidated appeals resulting from a single trial upon an indictment charging multiple defendants, an appellate court will usually not hesitate to reverse the conviction of one defendant and affirm the conviction of another if such action is called for by the record. Such reversals are in fact quite common. This record certainly calls for such reversal of petitioner's conviction and we fail totally to understand the opinion of the lower court.

Under the circumstances of this case the actions of the lower appellate court in arbitrarily refusing to consider petitioner's case separate from that of his co-defendant and in refusing even to acknowledge the facts in support of petitioner's argument was so arbitrary as to deny him equal protection and due process of law.

This case should be summarily reversed and the case remanded to the Appellate Court of Illinois for reconsideration.

3.

THE STATUTE PURSUANT TO WHICH PETITIONER WAS CONVICTED IMPROPERLY VESTS WITH THE PROSECUTOR THE DISCRETION TO DECIDE WHETHER CONDUCT ENGAGED IN SHALL BE PROSECUTED AS A FELONY OR A MISDEMEANOR AND THEREFORE VIOLATES DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

The indictable misdemeanor statute pursuant to which petitioner was prosecuted is violative of the equal Protection and Due Process Clauses of the Fourteenth Amendment because it vests with the unbridled discretion of the

prosecutor the decision as to whether the offense would be prosecuted as a misdemeanor, exposing petitioner to a maximum sentence of one year in the County Jail, is as a felony, exposing petitioner to a maximum penitentiary sentence of from one to five years. Equal Protection and due process were denied when the legislature placed such unreviewable discretion in one individual—the prosecutor.

The statute pursuant to which petitioner was charged provides as follows:

> "A person convicted of intimidation shall be fined not to exceed $5,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year or in the penitentiary from one to five years, or both fined and imprisoned." (Ill. Rev. Stats. 1971, Chap. 38, par. 12-6(b))

Support for petitioner's contention here is found in *Olsen* v. *Delmore*, 295 P. 2d 324 (1956) the Washington Supreme Court had occasion to consider the constitutionality of a penalty provision almost identical to the one here concerned. In *Delmore*, the defendant was charged in a felony indictment with unlawful weapons possession. He was convicted and sentenced to the penitentiary. The Act there provided that one convicted could be sentenced by fine or

> "(I)mprisonment in the county jail for not more than one year or both, *or* by imprisonment in the penitentiary for not less than one year nor more than 10 years." (emphasis added)

The Court stated that this provision was a rather clear indication that the legislature intended to vest in prosecuting officials the unguided and uncontrolled discretion to charge as for either a misdemeanor or a felony.

The Court thus proceeded to hold the statute unconstitutional, stating that:

> "A statute which prescribes different punishments or different degrees of punishment for the same act committed under same circumstances by persons in like situations is violative of the equal protection clause of the 14th Amendment of the United States Constitution. (*State* v. *Pirkey*, 203 Or. 697; 281 P. 2d 698 and cases there cited)"

Exactly the same constitutional infirmity exists under the essentially identical sentencing provision present here.

Further support for petitioner's contention is found in the opinions of Justices Black and Douglas in *Berra* v. *United States*, 351 U.S. 131 (1956) where this Court held that the jury was not properly instructed. Two dissenting Justices would have reached the broader equal protection question under the doctrine of plain error. Speaking to the question raised in this petition, Justice Black said:

> The Government's whole argument rests on the stark premise that Congress has left to the district attorney or the Attorney General the power to say whether the judge and jury must punish identical conduct as a felony or as a misdemeanor.
>
> * * *
>
> Of course it is true that under our system Congress may vest the judge and jury with broad power to say how much punishment shall be imposed for a particular offense. But it is quite different to vest such powers in a prosecuting attorney. A judge and jury act under procedural rules carefully prescribed to protect the liberty of the individual. Their judgments and verdicts are reached after a public trial in which a defendant has the right to be represented by an attorney. No such protections are thrown around decisions by a prosecuting attorney.

Justice Black also observed that:

> A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statutes can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General.

Both the *Delmore* case and the reasoning of Mr. Justice Black were found persuasive by the Illinois Appellate Court in *People* v. *McCollough*, 8 Ill. App. 3d 963 (1973), where the court held unconstitutional a voluntary manslaughter statute which allowed the prosecutor to determine if the conduct would be punished as a misdemeanor or as a felony. The Appellate Court decision in *McCollough* was cited in the lower court, while this case was pending on leave to appeal, however, the Illinois Supreme Court reversed the decision of the Appellate Court in *McCollough* and held the statute unconstitutional. *People* v. *McCollough*, ... Ill. 2d ..... (1974). Thereafter the petition for leave to appeal in this case was denied. Accordingly, the issue has been fully resolved by the Supreme Court of Illinois adversely to petitioner.

As noted by the lower court, the ". . . indictable misdemeanor is a relatively new type of offense, created over the last decade or two in connection with new types of criminal conduct . . ." (Appendix, p. 3a) The existence of several conflicting decisions in State courts renders desirable a decision by this Court on the validity of such statutes. For this reason, certiorari should be granted.

CONCLUSION

For the reasons urged herein, it is respectfully requested that a writ of certiorari issue to review and reverse the judgment of the Appellate Court of Illinois, First District, entered herein.

Respectfully submitted,

JAMES J. DOHERTY,
Public Defender of Cook County,
407 Chicago Civic Center,
Chicago, Illinois 60602,
(312) 443-6350,
Counsel for Petitioner.

RONALD P. ALWIN,
Assistant Public Defender,

ROBERT B. THOMPSON,
Law Student, IIT - Chicago-Kent College of Law,
Of Counsel.

December 23, 1974

APPENDIX A

Opinion of the Appellate Court of Illinois

Mr. Presiding Justice Hayes Delivered The Opinion Of The Court:

Indictment No. 72-99 charged McKennie Houston and Leroy Davenport with the offense of intimidation in that they allegedly communicated a threat to Lilly Mitchell to inflict physical harm on her person and on the persons of her children, thereby intending to cause Lilly Mitchell to prevent her son, Arzell Mitchell, from testifying in Court against Arthur Lee Dozer, a friend of McKennie Houston and Leroy Davenport. After a trial before a jury, Leroy Davenport and McKennie Houston were found guilty of the crime of intimidation and sentenced to from two and one half to five years in the penitentiary. From that conviction and sentence, defendants appeal.

At trial, eighteen-year-old Arzell Mitchell (also known as Isiah) testified that, on 18 August 1971 at about 4:00 P.M., he was robbed of $150 and shot once in the back. While in the hospital, he identified two persons as the offenders. One was an individual named Arthur Lee Dozer.

The next witness to testify was Lilly Mitchell. She testified that on 20 August 1971 she was in her sister's seven-room apartment at 4525 S. Federal Street in Chicago, when two male individuals came to the door. When Lilly answered the door, one of the individuals asked whether she was the mother of the boy who got shot. She replied that she was, whereupon they threatened her life and the lives

of Isiah and her other children if Isiah should testify against Dozer. Thereafter, the two individuals became verbally abusive. She then slammed the door and called detectives. The two individuals were subsequently identified by Lilly in a lineup as the defendants herein, Leroy Davenport and McKennie Houston.

On cross-examination, defense counsel attempted to impeach Mrs. Mitchell by confronting her with prior allegedly inconsistent statements made by her before the grand jury, at the preliminary hearing, and in the complaints charging appellants.

The final witness to testify was the investigating police officer, Officer Richard Crowley. He testified to having had a conversation with Arzell Mitchell relative to the latter's having been robbed and shot, after which the witness had occasion to arrest Arthur Lee Dozer and Ronald Caldwell. He also testified to having had a conversation with Mrs. Mitchell relative to two youths having approached and threatened her. (Defense counsel objected to the testimony concerning the conversation with Mrs. Mitchell on hearsay grounds and was overruled. Defense counsel also objected to the words "threatening her", which the trial judge then rephrased to "talking to her".) Based on the facts given to him by Lilly, the officer stated that he then arrested Leroy Davenport and McKennie Houston.

On cross-examination of Officer Crowley, defense counsel elicited the fact that his police report charged a Leroy Carpenter and not Leroy Davenport with the commission of certain crimes but not with the commission of the crime of intimidation.

On redirect examination, the officer testified that his police report, prepared in connection with the case, stated that Leroy Davenport, also known as Leroy Carpenter, had been charged, with unrelated offenses of armed robbery and aggravated battery, and that McKennie Houston had been charged with intimidation and with an unrelated armed robbery. This testimony was objected to by defense counsel as an impermissible reference to other crimes. The objections were overruled. Thereafter, the trial judge refused to permit defense counsel to demonstrate that the unrelated charges had been dismissed upon preliminary hearing thereof.

Opinion

The first issue we decide is the constitutionality of the intimidation statute. The issue was raised by defendants' motion to quash the indictment, which motion was denied. Defendants-appellants (hereafter appellants) contend that the punishment provision of the statute violates the equal protection and due process clauses of the constitution. The statute creating the offense of intimidation has made the offense an indictable misdemeanor. An indictable misdemeanor is a relatively new type of offense, created over the last decade or two in connection with new types of criminal conduct, as to which conduct the legislature appears to wish to give the State and/or the trial judge a broad discretion in respect of penalty, ranging from the felony penalties of imprisonment in the State penitentiary for more than one year and/or a fine, to the misdemeanor penalties of imprisonment in a correctional institution other than the penitentiary for not more than one year and/or a lesser fine. The gist of appellants' position is that, where

there are no standards governing or guiding the exercise of the prosecutorial (or judicial) penalty discretion created by the statute, the statutory scheme permits and encourages an arbitrary and discriminatory enforcement of the law. The Illinois authority cited for this proposition is *People* v. *McCollough* (1972), 8 Ill. 3d 963, 291 N.E. 2d 505.

It suffices to say that the *McCollough* decision has just been reversed by our Supreme Court (Docket No. 45634) in an opinion sustaining the constitutionality of a criminal statute under which the degree of prosecutorial and judicial discretion was even greater than the degree of discretion involved in an indictable misdemeanor. Hence, there is no merit to appellants' contention that the statute creating the offense of intimidation is unconstitutional.

The next issue we decide is whether the testimony of Lilly Mitchell, who was the sole occurrence witness for the State, was legally sufficient to support appellants' convictions beyond a reasonable doubt. Appellants contend that prior statements of the witness in the complaints charging appellants, in her testimony before the grand jury, and in her testimony at the preliminary hearing were so inconsistent with her trial testimony as to render her trial testimony legally insufficient to support a conviction.

Prior inconsistent statements of a witness bear on the credibility of the witness' trial testimony and go to the weight to be given to that trial testimony. This is a question for the jury. *People* v. *DeSavieu* (1973), 14 Ill. App. 3d 912, 303 N.E. 2d 782. From our examination of the record, we cannot say that the testimony of the complaining witness was so unsatisfactory as to leave a reasonable doubt

of the guilt of the appellants as a matter of law. Therefore, we will not disturb the jury's verdict.

Appellants next contend that the trial court committed reversible error in admitting evidence of unrelated offenses allegedly committed by appellants and, thereafter, in refusing to permit defense counsel to elicit the fact that those unrelated charges had been later dismissed. However, by first eliciting the fact that the police report charged Leroy Carpenter and not Leroy Davenport with the commission of the instant offenses, as well as of the unrelated offenses, defense counsel created an issue as to the identity of one of the defendants. It became incumbent upon the State to show that the name Leroy Carpenter meant Leroy Davenport.

Evidence which tends to prove a fact in issue is admissible even though it discloses that the defendant committed another crime; and evidence which establishes motive, intent, identity, accident, or absence of mistake is admissible even though it may also involve proof of a separate offense. See *People* v. *Dewey* (1959), 42 Ill. 2d 148, 246 N.E. 2d 232. Moreover, once the identification question had been resolved, it was not an abuse of discretion for the trial court to prohibit further inquiry into the subsequent disposition of the unrelated charges. After the original offenses charged were introduced, the State brought out that, as a result of the grand jury hearing, an indictment for intimidation was brought against appellants. The inference from this fact is that the other charges were not pursued. Further emphasis on this matter may well have resulted in the prejudice of which appellants now complain. Moreover, there was sufficient evidence, apart from any prej-

udice created by this testimony or by the court's ruling, to convict both appellants.

Fourthly, appellants contend that prejudicial error was caused by the prosecution's introduction into evidence of allegedly hearsay testimony of the investigating police officer which allegedly served the impermissible function of rehabilitating the credibility of the complaining witness. The offending testimony of the officer was that he had had a conversation with Mrs. Mitchell "relative to two youths approaching her and threatening her", and that as a result of the conversation he had had occasion to arrest Leroy Davenport and McKennie Houston.

For two reasons, we do not agree that what the officer related to the jury was hearsay. Primarily, the officer was testifying under oath only to the fact of what he had been told by Mrs. Mitchell and not to the substantive truth of her assertion that McKennie Houston and Leroy Davenport actually intimidated her, and thereafter, only to what he did as a result of the conversation. He was explaining how he had come to arrest appellants for the instant offense. See, *People* v. *Carpenter* (1963), 28 Ill. 2d 116, 190 N.E. 2d 738. Moreover, it is the lack of opportunity for cross-examination of the out-of-court declarant, whose assertion is being offered as substantive truth, that is the essential reason why the assertion must be rejected. *People* v. *Carpenter*, *supra*. Here the out-of-court declarant, Mrs. Mitchell, testified in court and was thoroughly cross-examined by defense counsel. The rule against hearsay is not applicable to the facts of this case. See, *People* v. *Poole* (1970), 121 Ill. App. 2d 233, 257 N.E. 2d 583.

We note that, in one respect, the officer's testimony was objectionable. It tended to rehabilitate the credibility of Mrs. Mitchell (whose credibility had been impeached by evidence of prior statements which were inconsistent with her trial testimony), because it disclosed that Mrs. Mitchell had made prior statements which were consistent with her trial testimony.* Our Courts have held that such rehabilitating testimony is objectionable as irrelevant, because the making of prior consistent statements does not negate the fact that prior inconsistent statements had been made. *People* v. *DePoy* (1966), 40 Ill. 2d 433, 240 N.E. 2d 616. We think, however, that in this case the rehabilitating aspect of the officer's testimony does not appear to have been the primary purpose for which the State introduced the testimony, but was merely an inevitable consequence of the legitimate purpose of having the officer explain how he had come to arrest appellants. In any event, the defense objection to the testimony was based on its alleged hearsay character and not on its rehabilitating aspect.

Fifthly, appellants contend that certain remarks made by the trial judge and certain questions asked by him during the course of the trial and in the presence of the jury deprived them of a fair trial. Our examination of the remarks and questions complained of does not disclose any error. The remarks and questions of the trial judge were aimed at the clarification of the questions asked by coun-

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* While the prior inconsistent statements related to details of the alleged incident, they were calculated to attack the credibility of Mrs. Mitchell to the point of creating doubt as to whether the alleged incident had occurred at all. In that sense, Mrs. Mitchell's prior statement to the officer was a prior consistent statement.

sel and at the clarification of the reasons for his own rulings, both of which were legitimate purposes. See, *People* v. *Clay* (1971), 1 Ill. App. 3d 736, 274 N.E. 2d 843. Moreover, appellants have failed to show how they were prejudiced by the trial judge's actions. The record demonstrates that the trial judge conducted a fair and impartial trial.

The sixth issue raised on this appeal is whether the closing arguments of the prosecution denied appellants a fair trial. Appellants argue first that the closing arguments of the prosecution violated the appellants' Fifth Amendment right to remain silent, and second, that certain remarks of the prosecutor amounted to an insinuation that the appellants had committed a separate offense of intimidation with respect to testifying against themselves in the present case.

With regard to the first contention, many times during closing argument the prosecutor, over objection, announced that the complaining witness' testimony that the two appellants had threatened her stood "unrebutted, uncontradicted, and undenied." Appellants concede that, had the prosecutor stopped with "unrebutted and uncontradicted", no error would have been committed. But since the prosecutor added the word "undenied", appellants contend the prosecutor intended improperly to call the jury's attention to appellants' failure to take the stand to deny the charges. We do not agree.

Where there is no evidence whatever contradicting the case made by the State, a statement by the prosecutor that the evidence has not been contradicted is not an unwarranted reference to the failure of the defendant to tes-

tify. *People* v. *Birger* (1928), 329 Ill. 352, 160 N.E. 564. This is so even where the prosecutor states that the evidence of the State had not been denied. *People* v. *Novak* (1938), 370 Ill. 220, 18 N.E. 2d 235; see also, *People* v. *Norman* (1963), 28 Ill. 2d 77, 190 N.E. 2d 819. We note the State's observation that its comment that its case had not been denied by appellants is not a *direct* reference to the failure of appellants to testify in their own behalf. While this is true, we express the opinion that the State's comment that its case had not been "denied by defendants" is of such dubious utility and propriety that it ought not to have been made. In the instant case, however, despite the frequency of the comment over objection, we think that the comment was not so prejudicial as to warrant reversal.

Neither do we agree with appellants' second contention that the prosecutor insinuated that appellants had committed a separate offense of intimidation relative to the present case. The alleged offending remarks are:

> "She (Mrs. Mitchell) is a witness. She did what she thought was right coming to report these threats against her. She did what she thought was right, coming to court, under oath, on the record, against these two, by taking whatever risk it involves for her to come to court and testifying."
>
> "Lilly Mitchell, coming here and testifying is an act of courage most of us never have to go through. She still lives at 51st and Federal, still in the ghetto, fear rampant . . . people can still dare to go up to citizens, threaten them, threaten their lives, put enough fear in the mind of that citizen to get away with anything."

At most these remarks constitute comment on crime and evil in the complaining witness' neighborhood and do not insinuate that appellants intimidated the witness not to testify *against them* in the instant case. The comments look to the future and state nothing that probably had not already occurred to the members of the jury. We find no error in these statements.

Defendants next contend that the minimum sentence of two years must be reduced to bring the sentence into compliance with the requirements of the Uniform Code of Corrections. Intimidation is a Class 3 felony. Ill. Rev. Stat. (1971), ch. 38, par. 12-6(b). Therefore, the minimum sentence cannot exceed one-third the maximum sentence of five years. Ch. 38, §1005-8-1(c) (4). The sentence as it now stands violates the Uniform Code of Corrections. Since this case has not reached a final adjudication within the meaning of the Code, the minimum sentence will be modified to one year and eight months. (See, *People* v. *Harvey* (1973), 53 Ill. 2d 585, 294 N.E. 2d 269.)

Finally, appellant Leroy Davenport contends that, since prior to trial and as a result of plea negotiations, the trial judge had agreed to sentence him to from one year to one year and a day if he would plead guilty and later he actually received a sentence of 2 and one-half to 5 years, the higher sentence was imposed as punishment for his decision to stand trial. It is our opinion that the mere fact that a higher sentence is imposed after trial than that offered before trial, without any other facts, does not warrant an inference that the higher sentence was imposed as punishment for having insisted on the right to stand trial. No such predisposition on the part of the trial judge

appears on the face of this record, as it does in the case of *People* v. *Moriarty* (1962), 25 Ill. 2d 565, 185 N.E. 2d 688 cited by appellant. Moreover, were not the possibility of a higher sentence a reality, any plea negotiation would be without consideration to support it. See, *People* v. *Bannister* (1974), 18 Ill. App. 3d 154, 309 N.E. 2d 279. We will not reduce the sentence further.

For the foregoing reasons the judgment of conviction below is affirmed but the sentence is modified as indicated herein.

Judgment Affirmed; Sentence Modified.

STAMOS, J., and LEIGHTON, J., concur.

APPENDIX B

State of Illinois
office of
Clerk of the Supreme Court
Springfield
62706

September 27, 1974

Hon. James J. Doherty
Cook County Public Defender
407 Chicago Civic Center
Chicago, Illinois 60602

No. 46942—People State of Illinois, respondent, vs. McKennie Houston, petitioner. Leave to appeal, Appellate Court, First District.

You are hereby notified that the Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Justin Taft
Clerk of the Supreme Court